

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>KENNETH E. STEPHENS</b>	:	DETERMINATION
	:	DTA NO. 819542
for Revision of a Determination or for Refund of Sales	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
the Period December 1, 1998 through August 31, 2001.	:	

---

Petitioner, Kenneth E. Stephens, 50 Hillwood Drive, Huntington Station, New York, 11746, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1998 through August 31, 2001.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 21, 2004 at 10:30 A.M. with all briefs to be submitted by September 10, 2004, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Certilman Balin Adler & Hyman, LLP (James Rose, Esq., and Steven Sulsky, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

***ISSUES***

I. Whether the audit methodology employed by the Division of Taxation was reasonably calculated to reflect the sales and use taxes due.

II. Whether petitioner had sufficient involvement in and control over the activities of Three Jesters Restaurant Corporation d/b/a Tupelo Honey so as to be considered a person

responsible for collecting and remitting sales tax on behalf of said corporation pursuant to Tax Law §§ 1131(1) and 1133(a).

III. Whether penalties should be canceled.

***FINDINGS OF FACT***

1. Prior to the period in issue, petitioner, Kenneth E. Stephens, and Paavo Raudkivi each owned 50 percent of the stock of Kiviken, Inc. d/b/a Mill River Inn. The Mill River Inn was a restaurant which employed Michael Meehan as the chef.

2. Petitioner and Mr. Raudkivi decided that they needed to expand their restaurant and that, rather than enlarge the existing restaurant, they would open a new restaurant which would be operated by Mr. Raudkivi. It was anticipated that petitioner would continue to run the Mill River Inn. In 1993, petitioner, Paavo Raudkivi and Michael Meehan formed the Three Jesters Restaurant Corporation (“Three Jesters”) for the purpose of constructing and operating a restaurant in Sea Cliff, New York known as Tupelo Honey. Petitioner, Paavo Raudkivi and Michael Meehan each owned one-third of the stock of Three Jesters.

3. The initial budget for the construction of Tupelo Honey was \$350,000.00. However, the cost of the restaurant escalated and ultimately cost almost \$800,000.00. Petitioner objected to the expenditure of the additional sums of money because the money had to be borrowed. Paavo Raudkivi, however, thought that it was necessary to spend the money. The difference in opinion over how much to spend on the project caused the relationship between petitioner and Mr. Raudkivi to become very strained. The third shareholder, Michael Meehan, did not become involved in these discussions and continued to work at the Mill River Inn.

4. Mr. Raudkivi supervised the construction of Tupelo Honey which lasted 18 months. Mr. Raudkivi hired the architect, the designer and about 90 percent of the contractors. Petitioner

was involved with some of the contracting through people he knew. In September 1984, the restaurant opened. Petitioner did not deal with any of the applications for permits except when his signature was required as a shareholder of the corporation. During the construction period, petitioner signed forms indicating that he was an officer of the corporation. Further, if Mr. Raudkivi was unavailable, petitioner would draft checks to different contractors.

5. Upon opening, petitioner was not involved in most of the daily operations of Tupelo Honey. However, the Mill River Inn and Tupelo Honey were approximately eight miles apart and petitioner would go to Tupelo Honey to take care of what needed to be done immediately, such as making sure that the employees were paid. Thereafter, he would return to Mill River Inn which he continued to operate.

6. Six months after the opening of Tupelo Honey, the relationship between petitioner and Mr. Raudkivi deteriorated to the point where they could not tolerate each other's presence. Consequently, in 1994 petitioner and Mr. Raudkivi agreed that petitioner would stay out of Tupelo Honey and Mr. Raudkivi would stay out of the Mill River Inn. After they reached their agreement, petitioner secretly went to Tupelo Honey on a semiannual basis. For a period of two or three years, he would go there but not open the door. There were one or two times when he stopped at the restaurant late at night and, if he was sure that Mr. Raudkivi was not going to be there, he would go into the building and have a drink at the bar. Petitioner would then pay for the beverage and leave. No one recognized him as an owner of the bar. Petitioner went to Tupelo Honey because he had a substantial sum of money invested, and he wanted to make sure that the restaurant was still operating. After the falling out occurred, Mr. Raudkivi did not go to the Mill River Inn for any reason.

7. From 1994 through May 2001, Mr. Raudkivi and Mr. Meehan were the officers and employees who operated Tupelo Honey. In his position as chef, Mr. Meehan's responsibility concerned the food that was served. Mr. Raudkivi was responsible for everything else including payroll, paying bills, managing staff, handling the tax and legal work with the accountant and the financial affairs of the corporation.

8. After petitioner withdrew from involvement in the activities of Tupelo Honey, Mr. Raudkivi signed most of the tax returns and documents that were filed for the period 1993 through 2001. Sometimes, Mr. Meehan signed the sales tax returns because Mr. Raudkivi was out of town.

9. From 1994 through May 2001, petitioner was a minority shareholder of Tupelo Honey but not an officer or employee. During this period, petitioner did not receive wages, bonuses, profits or any form of compensation from the corporation; petitioner did not exercise any management authority with respect to Tupelo Honey; petitioner had no daily responsibility, involvement with, knowledge of or control over the financial affairs or management of Tupelo Honey; he did not participate in the preparation and filing of Tupelo Honey's income or sales tax returns; he exercised no authority with respect to which creditors would be paid; he did not hire or fire employees; and, from 1995 through May of 2001, he did not draft any checks on behalf of Tupelo Honey.<sup>1</sup>

10. The books and records of Tupelo Honey were maintained by Mr. Raudkivi. From 1994 through May of 2001, petitioner did not have the ability to inspect the books and records of

---

<sup>1</sup> Tupelo Honey was under the management of Mr. Raudkivi during the months of March, April and May of 2001. The last week or two of May, the restaurant was under petitioner's management. The check for the period March 1, 2001 through May 31, 2001 was due June 20, 2001. Consequently, petitioner signed this check. Petitioner also signed the check for sales tax for the period June 1, 2001 through August 31, 2001 when he was the manager.

Tupelo Honey. If petitioner had demanded to inspect them, Mr. Raudkivi would have denied him access and treated him as a trespasser, perhaps resulting in a physical confrontation. The accountant for Tupelo Honey never provided petitioner with any information regarding the company's financial affairs or business affairs.

11. In May of 2001, Mr. Raudkivi and Mr. Meehan forfeited their stock in Three Jesters because the stock was pledged as collateral for loans that they did not pay. Mr. Raudkivi's stock in the Mill River Inn was also forfeited. The lenders, Mr. Robert Murphy and Mr. Frank Villanos, became shareholders in both restaurants along with petitioner and, at the request of the lenders, petitioner became actively involved in managing Tupelo Honey. At this time petitioner learned that his check-signing authority had been revoked. As a result, petitioner went to Mr. Meehan for a letter on Tupelo Honey stationery stating that petitioner should be added as an authorized signatory on the account of Three Jesters. Petitioner tried to ascertain when his check-signing authority had been removed but by this time the record was no longer available.

12. When petitioner took over Tupelo Honey it was in terrible condition. Petitioner was informed by his accountant that the last two payments of sales tax by Mr. Raudkivi had been dishonored for insufficient funds. The bar had approximately four bottles of liquor and three or four bottles of wine. Everything of value had been removed from the basement. Some documents remained in the basement but no bookkeeping dealing with checks or guest checks.

13. Since May of 2001, petitioner has written checks, paid vendors, paid creditors and been involved in every aspect of Tupelo Honey. He has handled the books and records relating to the financial affairs of Tupelo Honey.

14. On November 1, 2001, Tupelo Honey began operating as Sea Cliff restaurant with Mr. Murphy as a 46 percent owner and Messrs. Stephens and Villanos each possessing a 27 percent interest.

15. In or about August of 2001, the Division of Taxation (“Division”) initiated an audit of Tupelo Honey because the gross receipts reported on the Federal income tax returns were much greater than the sales reported on the sales tax returns for the corresponding period. On September 5, 2001, the Division’s auditor called the restaurant and asked to speak to the owner or responsible person in charge of the business. The individual responded that the auditor should speak to Mr. Stephens but that he was unavailable. Consequently, the auditor left a message that Mr. Stephens should return the call.

16. On September 10, 2001, petitioner returned the auditor’s telephone call and explained that his accountant, Mr. Hollander, would assist with the audit and that he would have Mr. Hollander contact the auditor. Petitioner also explained that he had taken over for his partner, Mr. Raudkivi, and that his former partner had the books and records of the corporation. Petitioner provided the telephone number where Mr. Raudkivi could be contacted. Thereafter, the auditor mailed a letter to petitioner’s attention at Three Jesters notifying the corporation that it had been selected for a sales tax field audit. The letter stated that all of the books and records pertaining to the sales tax liability for the period June 1, 1998 through May 31, 2001 were to be made available. Attached to the letter was a checklist that included, among other things: sales invoices, merchandise purchase invoices, bank statements, cash receipts journal, cash disbursements journal, general ledger, sales tax returns, Federal income tax returns, bank deposit slips, guest checks and cash register tapes.

17. On October 3, 2001, the auditor called Mr. Raudkivi twice and on October 5, 2001, he called an additional time. The auditor did not speak to Mr. Raudkivi on any of the occasions and he never returned any of the auditor's telephone calls. The auditor did not take any additional actions to obtain the records from Mr. Raudkivi.

18. On or about October 11, 2001, the auditor mailed an audit appointment letter to Three Jesters stating that a sales tax audit would begin at the Nassau District Office on October 29, 2001. The letter requested that the corporation provide all of its books and records pertaining to its sales tax liability for the period September 1, 1998 through August 31, 2001. The Division included a copy of a checklist of records to be provided on the audit. On October 17, 2001, Mr. Stephens confirmed that he had received the last appointment letter. On October 25, 2001, Mr. Hollander called the auditor and stated that no one would be appearing at the audit appointment because neither he nor Mr. Stephens had any of the books and records of Three Jesters.

19. On or about November 2, 2001, the auditor mailed an audit appointment letter to Mr. Hollander requesting the same books and records as he had requested in the previous audit appointment letters. Mr. Hollander was also advised that the audit appointment had been rescheduled to November 19, 2001. No one appeared at this audit appointment. Further, none of the books and requested by the Division were provided.

20. Since no one appeared for either appointment and the books and records of the corporation were not provided, the auditor compared the gross receipts of Three Jesters that were reported to the Internal Revenue Service ("IRS") for the calendar year 1998 of \$952,663.00 to the sales that the corporation reported to the Division on its sales and use tax returns of \$598,456.00. In order to determine the restaurant's sales for the calendar year 1998, the auditor added two-thirds of the sales reported by Three Jesters for the period December 1, 1997 through

February 28, 1998 and one-third of the sales reported by Three Jesters for the period December 1, 1998 through February 28, 1999 to the sales reported by the corporation for the tax periods which fell completely within 1998.<sup>2</sup> On the basis of this comparison, the auditor determined that the gross receipts reported to the IRS for the calendar year 1998 were 59.19 percent higher than the sales reported to the Division.

21. In order to calculate the amount of tax due, the Division multiplied the reported sales for the audit period of \$1,750,928.00<sup>3</sup> by 1.5919 to arrive at audited taxable sales for the audit period of \$2,787,302.00. The Division reduced the audited taxable sales by the reported taxable sales for the audit period of \$1,593,993.00 to determine additional taxable sales of \$1,193,309.29 and additional tax due of \$101,431.29.

22. The Division issued a Notice of Determination, dated February 19, 2002, Notice L-020629622-7, to Three Jesters which assessed a deficiency of sales and use taxes in the amount of \$101,431.29 plus interest in the amount of \$22,191.41 and penalty in the amount of \$32,546.00 for a balance due of \$156,168.70. The Division also issued a Notice of Determination, dated March 14, 2002, Notice L-020646714-6, to petitioner which assessed a deficiency of sales and use taxes in the amount of \$94,792.08 plus interest in the amount of \$19,989.98 and penalty in the amount of \$30,467.62 for a balance due of \$145,249.68. The

---

<sup>2</sup> The Division tested the reasonableness of using 1998 gross receipts reported to the IRS as a basis of estimating sales for the audit period by dividing the \$139,064.00 tip income the corporation reported on its Federal income tax return for 1999 by 15 percent and calculated estimated sales for 1999 of \$927,093.33. On the basis of this test, the auditor determined that sales for the calendar year 1999 should be similar to 1998.

<sup>3</sup> At the time the Division was performing its calculations, Three Jesters had not filed a sales tax return for the last three months of the audit period. Consequently, the auditor assumed that taxable sales for the period June 1, 2001 through August 31, 2001 were equal to the sales reported for the period June 1, 2000 through August 31, 2000 of \$156,935.00. Three Jesters reported sales of \$1,593,993.00 for the period September 1, 1998 through May 31, 2000. Thus, the reported sales of \$1,593,993.00 plus \$156,935.00 equals the Division's figure for reported taxable sales of \$1,750,928.00.



difference in the amount of the assessments arises from the fact that Three Jesters was assessed for the quarter ended November 30, 1998 while petitioner was not. Petitioner was assessed the omnibus penalty in addition to the statutory penalty for failure to pay because the amount of tax due was greater than 25 percent of the tax reported.

23. In March of 2002, Three Jesters filed its sales tax return for the period June 1, 2001 through August 31, 2001 and reported sales of \$102,405.00. Three Jesters remitted tax in the amount of \$8,561.05. As a result, the amount of tax asserted to be due by the Division from Three Jesters is \$92,870.24 (\$101,431.29 minus \$8,561.05) and the amount of tax sought by the Division from petitioner is \$86,231.03 (\$94,792.08 minus \$8,561.05).

24. The documents in the record show: that on September 22, 1993, petitioner signed, as president, a form which elected that Three Jesters be treated as a New York S Corporation; that pursuant to corporate resolutions dated March 23, 1994 and September 25, 1995, petitioner was authorized to sign checks and other banking instruments and to borrow money on behalf of the corporation; that a corporate resolution dated June 28, 1999 authorized petitioner to sign checks and other banking instruments on behalf of the corporation;<sup>4</sup> and, that a document filed with the Department of State for the period July 2001 listed petitioner as the chief executive officer.

25. The Schedules K-1 filed with Three Jesters' New York State corporation franchise tax returns show that petitioner owned 50 percent of the stock in 1997 and 27 percent of the stock in 1999 and 2000. The same schedules also show that petitioner realized losses from Three Jesters in 1997, 1999 and 2000.

---

<sup>4</sup> The title of treasurer appears in print under petitioner's name. This title is crossed out and, in its place, the term "Authorized Signature" is handwritten. Two other individuals are listed as an authorized signature. Mr. Raukivi signed the resolution as president and Mr. Meehan signed the resolution as secretary.

26. Petitioner reported nonpassive losses from Tupelo Honey on his personal income tax returns for the years 1998 through 2001. Petitioner also reported that he materially participated in Tupelo Honey's business activities in 1999 and 2000. Petitioner's accountant checked the "at risk" box on petitioner's tax returns because he contributed most of the money.

27. The Division has submitted proposed findings of fact in a narrative format without numbering any of the proposed findings of fact. Since the Division has not separately numbered each of the proposed findings of fact, they have not been ruled upon. However, with certain modifications, they have been generally accepted. Petitioner's proposed findings of fact have been largely accepted and incorporated herein. However, proposed finding of fact "19" has been rejected as irrelevant. Additional findings of fact have also been made.

### ***CONCLUSIONS OF LAW***

A. The first question presented is whether the Division utilized an audit method that was reasonably calculated to determine Three Jesters' sales tax liability. Petitioner argues that the Division should have taken additional steps to obtain Three Jesters' books and records and submits that if it had done so, it might have obtained said records. In support of this argument, petitioner notes that the auditor was told that Mr. Raudkivi had the books and records. Nevertheless the auditor never went to Mr. Raudkivi's office or wrote a letter to Mr. Raudkivi requesting the books and records. Petitioner also points out that he issued a subpoena to Mr. Raidkivi for the records but that Mr. Raudkivi did not comply with the subpoena.

B. At the hearing, petitioner's accountant maintained that the difference between the gross receipts per the Federal returns and the taxable sales per the sales tax returns arose because his firm inadvertently used deposits instead of sales in order to prepare the Federal returns. The deposit amounts allegedly included sales, sales tax, tips and funds that were advanced to the

business. In contrast, the sales tax returns were based on computerized summaries provided by Mr. Raudkivi. Petitioner's accountant believed that the Federal returns had been amended. However, amended returns were not offered into evidence. On the basis of this testimony, petitioner contends that the audit method was unreasonable because there was no basis to determine that the Federal returns were correct and the sales and use tax returns were incorrect.

C. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.* (Tax Appeals Tribunal, February 20, 2003), as follows:

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), "from which the exact amount of tax due can be determined" (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of*

*Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).

D. Petitioner's argument regarding the audit methodology is without merit. In this case, the Division made repeated requests for the books and records of Three Jesters and they were not provided. Assuming that petitioner was a responsible officer, the inability of petitioner to gain access to the books and records does not absolve him of the obligation to produce the books and records requested by the Division for the audit period (*Matter of Maple Leaf Motor Lodge*, Tax Appeals Tribunal, August 30, 1990). Since the corporation never provided any books and records to substantiate its reported sales, it was reasonable to use gross receipts reported to the Internal Revenue Service to estimate Three Jesters' sales tax liability (*Matter of Merbaum Associates, Inc.*, Tax Appeals Tribunal, August 17, 2001; *Matter of Stephen Gallagher, Inc.*, Tax Appeals Tribunal, August 3, 2000).

E. The testimony of petitioner's accountant raises serious questions. If this testimony was correct, it would mean that Three Jesters was reporting greater income and paying more tax than was due. Therefore, the corporation would have had an incentive to file amended returns. Although petitioner's accountant believed that an amended return was filed, there was a reluctance to offer a copy of an amended return into the record and scant evidence that such a return was filed. Further, as the Division noted, an analysis of the tip income for 1999 supports the conclusion that it was appropriate to rely on the receipts reported on the Federal income tax returns for 1998 to calculate the amount of tax due. Therefore, the explanation offered by

petitioner's accountant of the discrepancy between the Federal tax returns and the New York State sales and use tax returns is rejected.

F. Petitioner's argument that it was improper to rely on the sales reported for the period June 1, 2000 through August 31, 2000 for the period June 1, 2001 through August 31, 2001 is also without merit. The test of whether the audit methodology was reasonable is based upon the information available to the Division at the time the notice was issued (*Matter of Continental Arms Corp. v. State Tax Commn.*, 72 NY2d 976, 534 NYS2d 362; *Matter of Northern States Contracting Company*, Tax Appeals Tribunal, February 6, 1992). In this case, the notice was issued on or about February 19, 2002 and the sales tax return for the period ended August 31, 2001 was received in March 2002. Accordingly, the Division's use of the sales reported for the period June 1, 2000 through August 31, 2000 as an estimate for June 1, 2001 through August 31, 2001 was reasonable.

G. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

H. The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial

income from the corporation or stock ownership (*see*, 20 NYCRR 526.11[b][2]; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027).

I. Here, the clear weight of the evidence supports the conclusion that petitioner is not responsible for the taxes due from Three Jesters. Petitioner was not an officer or employee of Three Jesters from 1995 through May 2001 and did not receive any wages from the business during the period in issue. He did not have any authority with respect to the preparation of the tax returns. With the exception of the last portion of the audit period, which has been accounted for, petitioner did not sign any of the tax returns or have any involvement in their preparation. The uncontradicted evidence is that petitioner did not have any responsibility for the management of Three Jesters during the audit period. Petitioner's lack of involvement in the management of Three Jesters is illustrated by the fact that his check-signing authority was removed during the audit period without his being aware of the change. Further, he did not have a role in the maintenance of the books of Three Jesters. To the contrary, petitioner did not have access to the books of Three Jesters. The evidence also shows that petitioner was not involved in hiring or firing the employees of Three Jesters. On the basis of the forgoing, it is concluded that petitioner was merely a stockholder and not a responsible officer or employee of Three Jesters. It follows that he is not responsible for the sales and use taxes due from the corporation during the period at issue.

J. The documentary evidence offered by the Division does not contradict the petitioner's position. Rather, an examination of the dates on the documents tends to support petitioner's explanation that during the period in issue he was divested of any role in the management of

Three Jesters and became a mere investor. In this regard, it is particularly noteworthy that in the corporate resolution dated June 28, 1999 an officer title under petitioner's name was crossed out. For the same reason, the Division's argument that petitioner disregarded his duty as a corporate officer is rejected.

K. In view of the forgoing, petitioner's argument that the penalties should be canceled is moot.

L. The petition of Kenneth E. Stephens is granted and the Notice of Determination, dated March 14, 2002, is cancelled.

DATED: Troy, New York  
March 3, 2005

---

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE